"* * * proceeded upon the theory that the act and all the regulations are without application to their situation."

The estoppel relied on (p. 409) arose out of acts of subordinate officers without statutory authority to bind the Government. There was no question presented as to compliance with a statute and regulation involving an irregularity or omission subsequently cured and treated by the officer having full statutory authority as regular in all respects.

2. *Rock Island A. & L. R. R. Co. v. United States,* 254 U. S. 141, 143 (Sol. Gen. brief p. 11): In this case the taxpayer, after its claim in abatement had been denied and the tax paid, brought suit for recovery, without having filed any application for refund (p. 142). Such application was a statutory prerequisite to to the right to sue the United States.

There was r question presented as to any irregularity or omission in the application, but a total failure to file the document required by the statutes and regulations.

3. *United States v. Noveck,* 273 U. S. 202 (Sol. Gen. brief, p. 13). The safeguards mentioned were afforded by the affidavit filed in the instant case (R. 8)

4. *Chesapeake & Del. Canal Co. v. United States,* 250 U. S. 123, 125 (Sol. Gen. brief, p. 22) involved the question as to whether, in the absence of a Federal statute, the United States was barred by laches of nearly forty years delay in bringing suit.

5. *Girard Trust Company v. United States,* 270 U. S. 163: (Sol. Gen. brief, p. 11) In this case no attempt was made to cure the omission in the protest to state specifically, as required by the statute, the grounds relied upon.

6. *United States v. Updike,* 1 Fed. (2d), 550, 555 (Sol. Gen. brief p. 15; D. C. Neb. 1924). In this case the court intimates that all that is required in a return for the purpose of setting running the 5 year period is that the act of the taxpayer in filing it should be "affirmative and honest." No return was filed (p. 555) but a mere statement of reasons for not filing a return. See also on appeal *Updike v. United States,* 8 Fed. (2d) 913, 915, where it appears that the blank form 1031 was returned to the collector with a letter stating reasons for not filing it. As held by the Court of Appeals this was: (p. 915)

> "* * * a refusal—to make any return under said act."

7. *Botany Mills v. United States,* 278 U. S. 282, 289. In this case at p. 289, the Court indicates that under certain circumstances an estoppel may arise but that the facts found did not disclose any adequate ground of estoppel. The statute required a settlement agreement in order to become obligatory to be made by the Commissioner, approved by the Secretary and accompanied by an opinion of the Solicitor. There was neither approval nor opinion. The only ground of estoppel urged was that subordinates had made the agreement (p. 288) and thereafter the Commissioner had made an additional assessment based thereon. (*Ibid*)

The quoted excerpt from the opinion must of course be read in the light of these facts. There was no question of any irregularity subsequently cured but of an entire failure to comply with the statute.

Other cases cited do not appear to require detailed discussion.

VI.

THE UNITED STATES, THROUGH THE COMMISSIONER, WAIVED THE IRREGULARITY OF LACK OF VERIFICATION WITH RESPECT TO THE RETURN ON FORM 1120.

In *Tucker v. Alexander*, 275 U. S. 228, 231, the taxpayer failed to set forth in his appeal to the Commissioner for a refund of the tax the valid ground upon which his claim was based. Upon the trial the ground stated before the Commissioner was abandoned and a new ground not so presented relied on (p. 229). The district court dismissed the suit. The Circuit Court of Appeals for the Eighth Circuit held that the omission to state this ground was fatal and affirmed.

This Court in an opinion by Mr. Justice Stone, held that the irregularity could be waived by the counsel for the United States.

As pointed out in that case referring to the statute and regulations (p. 231):

> "The statute and regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and preparing for trial."

Mutatis mutandis this ruling seems to be appropriate to the facts in the instant case.

In the following cases cited in the Solicitor General's brief this Court has at least intimated that where both parties act in good faith irregularities may be waived and even that an estoppel may arise.

Botany Mills v. United States, 278 U. S. 282, 289.

Utah Power & Light Co. v. United States, 243 U. S. 389, 409, where the rule laid down is expressly stated to be "general" and the suggestion is made that there may be exceptions.

The provision in Article 407 (*supra*, p. 2) that

> "*Imperfect* or incorrect returns *will not be accepted* as meeting the requirements of the statute."

merely *authorized* the collector not to receive an "*imperfect*" return. It was permissive not mandatory. Nor was "imperfect" defined. The collector was clearly empowered to exercise discretion as to what irregularity or omission should cause him to treat the return as "imperfect." In the instant case, as clearly appears upon its face, the return was in fact accepted by the Collector, forwarded to the Commissioner, made the basis of an assessment, audited, the affidavit of verification attached and treated in all respects from the date of filing (May 31, 1919; R. 8) as if it had in fact been duly verified when filed.

The presence or absence of the "oath" was deemed of so little importance that it was not discovered until shortly before September 27, 1923 (R. 8), when *at the Commissioner's request* (*Ibid.*) the affidavit was executed and placed on file (see opinion C. Ct. of Appeals, R. 13).

The Government should not be permitted to lay another "trap for the unwary" in a case where it clearly appears that the taxing authorities were in no way prejudiced or misled by the irregularity or omission involved, and without justification or excuse waited until some six and a half years after the date of filing to make the determination of liability to an additional assessment now before the Court.

VII.

For the convenience of the Court we have prepared and filed with the clerk a copy of the return on Form 1120 as filed by the taxpayer respondent. The "original" return used upon the argument in the Circuit Court of Appeals and referred to in its opinion (R. 12) is in fact a photostat. A duplicate photostat is also filed with the clerk. The copy of the return has been carefully compared with the photostat and found to be accurate.

It will be noted from the entries made in the usual course in the Commissioner's office that this return was made the basis of the assessment and that on its face are the statements:

> "See affidavit att'd* for signatures."
> "RETURN AUDITED." Tax outlawed."

and other entries which indicate clearly that this return was made the basis of the additional determination of liability involved in these proceedings.

The return on Form 1120 was annexed to the stipulation of facts and marked "Exhibit A" (R. 6). It is found as a fact by the Board (R. 8).

It would seem an unnecessary formality to require the duplicate photostat to be sent up by the court below under Rule 9, paragraph 3. The Washington counsel was not informed until January 13, 1930, that the duplicate photostat was available and that it is now in the custody of the clerk of the Circuit Court of Appeals. He had, however, requested the Ohio counsel early in December, 1929, to advise him thereon. The Ohio counsel was away and owing to the limited time available

*"Attached."

was unable to communicate with the Washington counsel in time. This situation has been chiefly the result of the unexpected adjournment of this court on December 11, 1929.

On the next motion day—January 20th, it is intended if necessary, to bring this matter to the attention of this Court.

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January 16, 1930.